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No. 783

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

GLORIA STOLLAR,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

Gloria Stollar, petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois, entered in the case of *The People of the State of Illinois* v. *Gloria Stollar,* on May 20, 1964.

Opinion Below.

The opinion of the Supreme Court of Illinois is printed in Appendix A hereto, *infra.* App. p. 1, and is reported at 31 Ill.2d 154, 201 N.E.2d 97.

Jurisdiction.

The judgment of the Supreme Court of Illinois was entered on May 20, 1964, a timely petition for rehearing was denied on September 25, 1964. The jurisdiction of this Court is invoked under 28 U.S.C., section 1257(3).

Question Presented.

Whether the petitioner was denied due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, as the result of her being sentenced to imprisonment for eighteen months after a summary trial for contempt of court.

Statement.

The petitioner, Gloria Stollar, was arrested by writ of attachment, taken from her hospital bed where she had given birth to an illegitimate child, and, in an emotionally disturbed state, was taken before the Probate Court of Cook County to be dealt with summarily. The Court was informed that the defendant's father believed her to be in need of psychiatric care. However, no sanity test was ordered nor did the court conduct a sanity hearing.

With the amicus curiae prosecuting, the court immediately proceeded with the taking of evidence and, although no formal plea had been entered, commenced the hearing by an examination of the petitioner. The following facts were in essence admitted by the petitioner.

In May, 1959, one Harry Stollar, an automobile dealer died, leaving the bulk of his estate to his daughter Jacqueline, with his wife Gloria, the defendant, as guardian. According to the inventory signed by the defendant, the minor's estate amounted to approximately $48,000 dollars. By order of the Probate Court, that money was distributed to the following accounts: $7,500 in Bell Savings and Loan Association; $7,500 in Chicago Federal Savings and Loan Association; $7,500 in Belmont National Bank of Chicago; and $13,764.53 in the Aetna State Bank. The Probate Court allowed the withdrawal, at first of $200 per month and, later $300 per month as and for the support and maintenance of the minor.

The evidence further showed that in addition to the $48,000, accounted for in the inventory, there were two insurance policies of the Prudential Insurance Company, on the life of Harry Stollar, the proceeds of which amounted

to $24,296.05. The beneficiary of these policies also was Jacqueline Stollar. This money was paid by the Prudential Insurance Company to Gloria Stollar as guardian of the estate of Jacqueline Stollar, a minor. This money she deposited in another account in the Aetna State Bank. Thereafter, without discharging her attorney, Arthur Bluestein, Mrs. Stollar, retained the services of another attorney, Mortin I. Kovin, who prepared and presented a petition to the Probate Court asking leave of court for the withdrawal of the various savings accounts for redeposit in the Aetna State Bank. This was granted, but the order was drafted in such a way as to omit the requirement that the funds be redeposited subject to order of the Probate Court. In order to accomplish the withdrawal from the savings accounts, the defendant executed certain lost pass book affidavits, although the evidence seemed to indicate that she was aware of the fact that the books were in the possession of Attorney Bluestein.

Without leave of court, the petitioner, began to withdraw large sums of money from the various accounts of the estate. Much of this money was given to her father who was trying to operate Harry Stollar's automobile lot. Other monies according to her explanation were used for the payment of rent, private school for Jacqueline, maid, food, clothing for Jacqueline, medical expenses for the family, telephone, summer cabana at a motel, mortgage payments on her former home in Skokie, Illinois, Attorney's fees, automobile expenses, entertainment, utilities, taxes, beauty parlor, landscaping and funeral expenses.

At the time of trial approximately $90.00 of the total estate including the proceeds of the two insurance policies, remained.

In explanation the defendant stated that she gave large sums of money to her father in the hope of carrying on the automobile lot of her late husband. This she was not able to do. In further explanation she said that she had been used to a high standard of living when her husband was alive and that she did not realize that what she did was wrong, assuming that because the money was her daughter's, it was hers also, and further, she provided for her daughter very well.

The questions presented in this petition were raised primarily as a result of the Supreme Court of Illinois' opinion affirming the order of the Probate Court of Cook County. Therefore a petition for rehearing was presented which reads in whole as follows:

"We respectfully request the Court to reconsider this case in the light of the questions which the opinion of the Court has raised and which are more numerous than the questions which it has answered.

"The Court has said that the maximum sentence provided in the Criminal Code of 1961 for offenses for which punishments are not otherwise specified does not apply to contempts. The Court has raised but failed to answer the question whether there is a maximum sentence for contempt.

"By holding that contempt is not a criminal offense, as defined by the Code, the Court has raised the question whether contempt, which would not be a criminal offense as is defined in Article II Section 8 of the Constitution of the State of Illinois, can be punished by imprisonment in the penitentiary or by death. The further question in this context is whether the rights of a contempt defendant are governed by Section 9 of Article II.

"If a person pleads guilty to a contempt, must he be warned of the consequences of his plea, and if so, what shall the trial court instruct a defendant as to the possible penalties.

"These questions can be most satisfactorily answered by this Court's holding that contempt is an offense within the meaning of the Criminal Code of 1961 and that the penalties provided therein are the penalties in cases of contempt. If the Court adheres to its decision, the box of Pandora is open."

Sections 8 and 9 of Article II of the Constitution of the State of Illinois are:

> § 8. No person shall be held to answer for a criminal offense, unless on indictment of a grand jury, except in cases in which the punishment is by fine, or imprisonment otherwise than in the penitentiary, in cases of impeachment, and in cases arising in the army and navy, or in the militia when in actual service in time of war or public danger: *Provided,* that the grand jury may be abolished by law in all cases.
>
> § 9. In all criminal prosecutions, the accused shall have the right to appear and defend in person and by counsel; to demand the nature and cause of the accusation, and to have a copy thereof; to meet the witnesses face to face, and to have process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.

Reasons for Granting Writ.

The question which this case raises is essentially the one at which this Court raised by its dictum in *United States* v. *Barnett*, 376 U.S. 681, 84 S.Ct. 984, 12 L.Ed.2d 23, as applied to state court contempts. That is, whether "punishment by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses." 84 S.Ct. at page 992, n. 12.

The facts of the case indicate that the petitioner could very well have been charged with the crime of embezzlement under the Illinois Criminal Code of 1874. (Ill. Rev. Stat. (1961) Ch. 38, Secs. 207, *et seq.*) She could not be held to answer such charge except upon indictment. Upon being held to answer such charge, she would have been entitled to trial by jury. She would immediately have known the seriousness of the charge and the extent of punishment, one to ten years in the penitentiary. A plea of guilty could not have been entered without the court's having carefully apprised her of the possible consequences of that plea. (Rule 26, Rules of the Supreme Court of Illinois, Ill. Rev. Stat. (1963) Ch. 110, Sec. 101.26.) She would have been surrounded by the presumption of innocence and all of the safeguards which have been developed to shield the innocent from conviction and the guilty from undue oppression. Gloria Stollar was however, sentenced to a punishment as severe as would have been possible had she been charged with the felony but was tried summarily as a contemnor.

She was brought before the court summarily and upon promises of leniency extended to her and her attorney by the amicus curiae agreed to testify concerning her stewardship of her daughter's estate. Inconsistent with the spirit of Rule 26 of the Supreme Court of Illinois the trial court

did not apprise her of the consequences of what was, in effect a plea of guilty. When the Court's attitude became apparent, she asked for a continuance; this was denied. The Court, after exacting a full confession from her sentenced her to eighteen months in the county jail in spite of the request by the amicus curiae for leniency and the recommendation of the State's Attorneys office of six months. A term of eighteen months in the county jail is not a penalty for a petty offense either under the United States Code or the Illinois Criminal Code of 1961. The procedure which the trial court followed in this case approaches the unconscionable and is a violation of the due process requirements of the XIVth Amendment to the constitution of the United States. In the light of this court's pronouncement in the *Barnett* case the question in this case is of great importance and should be decided.

CONCLUSION.

For the above and foregoing reasons a writ of certiorari should issue to review the judgment of the Supreme Court of Illinois entered in this case.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A

OPINION OF THE SUPREME COURT OF ILLINOIS

The People of the State of Illinois, Defendant in Error, v. Gloria Stollar, Plaintiff in Error.

Mr. JUSTICE SCHAEFER delivered the opinion of the court:

This is a writ of error to review a judgment of the probate court of Cook County which found the respondent, Gloria Stollar, guilty of contempt of court and sentenced her to imprisonment in the county jail for 18 months. The respondent does not challenge the sufficiency of the proof to establish her guilt, but contends that her constitutional rights were violated because the trial court erred in failing to conduct a hearing to determine her sanity, because she was induced by promises of leniency to admit the charges made against her, and because the request of her attorney for a continuance was denied. She also contends that the sentence was excessive upon the facts, and that it exceeded the permissible statutory maximum.

Harry Stollar, the respondent's husband, died May 9, 1959. He left the bulk of his estate to their daughter, Jacqueline, who was then five years old. The respondent was appointed guardian of her daughter's estate. On July 15, 1959, she filed her inventory as guardian, showing assets in the form of cash in the sum of $47,784.90. Of this amount, $81.09 remained on July 13, 1962. In addition, she received the proceeds of two insurance policies payable to Jacqueline in the total sum of $24,296.05, which were not included in the inventory that she filed as guardian. The bank account in which she deposited this amount was closed on June 8, 1960, by the last withdrawal in the sum of $5100.

On September 24, 1962, the attorney who represented the respondent as guardian filed a petition reciting that she had refused to cooperate with him, alleging his belief that she had withdrawn considerable moneys from the minor's estate over and above the amounts authorized by orders of the court, and asking leave to withdraw his appearance as attorney for the guardian. Notice of this petition had been mailed to the respondent on September 4, 1962. A guardian *ad litem* was appointed to investigate the allegations of the petition. The report of the guardian *ad litem* disclosed the condition of the estate and the existence of the two insurance policies that had not been inventoried. A rule to show cause was issued, hearings were conducted and the judgment under review was entered.

The rule to show cause was returnable November 2, 1962. The respondent did not appear on that date. Later it was learned that she had given birth to a child on November 1, 1962, and was hospitalized. The hearing on the rule to show cause was continued to November 13, 1962. The contention that a sanity hearing was required was not raised in the trial court by the attorney who represented the respondent. As asserted now, it is based upon two statements made during the course of the proceedings. The first was made by an assistant state's attorney on November 9. He said: "The record will show that the reason why she failed to appear was that she was suffering from an emotional disturbance * * * and we were not given the information as to what hospital or where she was." The second statement was made by the guardian *ad litem* on November 13, at the outset of the hearing on the rule to show cause. He said: "I have come to the court, not only on behalf of the minor, but wish to relate for the father of Mrs. Stollar, who was on one former occasion before Judge Cooney, and pleaded that Mrs. Stollar has been emotionally disturbed

and upset and that some mercy should be given to her and that she should be examined and cared for by a psychiatrist." Both of these remarks must be appraised in the context of all that transpired before the court, and particularly in view of the desire of the respondent, expressed by her father, to keep the birth of the child from being a "public record." So appraised, we are of the opinion that they can not fairly be taken as indicating that anyone connected with the proceeding in the trial court thought that the mental condition of the respondent was such that a sanity hearing was indicated. The attorney who represented respondent there made no such suggestion, and the written motion for a new trial that he filed made no such claim.

The motion for a new trial, however, did assert that the defendant's constitutional rights were violated because the court refused to grant her sufficient time to prepare her defense and because the guardian *ad litem* misled the respondnt into what amounted to a plea of guilty by the representation that he would recommend leniency. No request for a continuance was made before the hearing commenced. After the respondent had testified for some time, her attorney requested "a short continuance." The court immediately adjourned the proceedings until three o'clock in the afternoon. On the following morning, when her attorney asked for a continuance "to give me time to prepare my case," the request was denied.

At the outset of the hearing, the guardian *ad litem* represented to the court, in the presence of respondent and her attorney, that her attorney had agreed that if the record so warranted, he would "consent and agree to vacating the order of appointment of Mrs. Stollar as guardian. If there is a finding of fraud of both the inventory and the current account, he is still willing to leave it up to the

mercy of the court as to any judgment or punishment that Mrs. Stollar should receive." He then continued with the statement that has been quoted earlier in this opinion. The court inquired as to whether this statement was satisfactory to Mrs. Stollar and then announced that it was satisfactory both to her and to her attorney. Moreover, the plaintiff in error testified that she had voluntarily indicated that she was willing to inform the court of all that had occurred in the performance of her duties as guardian of the estate and to place herself on the mercy of the court. She testified that she was not coerced to do this and that the court had made no promise that the judgment and punishment of the court "will be any less than you should receive."

These circumstances do not, in our opinion, indicate that the respondent was prevailed upon by promises of leniency to testify concerning her management of her daughter's estate, or that the trial court erred in refusing a continuance after the hearing had commenced.

The respondent's contention that the sentence of 18 months exceeded the maximum permitted by statute is based upon that portion of section 1—7 of the Criminal Code of 1961 which provides, "The court in imposing sentence upon an offender convicted of an offense for which no penalty is otherwise provided may sentence the offiender to a term of imprisonment not to exceed one year or a fine not to exceed $1,000, or both." (Ill. Rev. Stat. 1961, chap. 38, par. 1—7.) The respondent reads this provision as limiting the permissible sentence that may be imposed for contempt of court. But that it relates only to those offenses defined in the Code, and does not apply to contempt of court is, in our opinion, made clear by section 1—3: "No conduct constitutes an offense unless it is described as an offense in

this Code or in another statute of this State. However, this provision does not affect the power of a court to punish for contempt or to employ any sanction authorized by law for the enforcement of an order, civil judgment, or decree." Ill. Rev. Stat. 1961, chap. 38, par. 1—3.

To establish the excessiveness of the sentence, considered not as a matter of law but in the light of the facts disclosed by the record, the respondent argues that the mishandling of her daughter's estate was not due to a conscious attempt to commit a theft, but was due rather to her belief that her daughter's money was indistinguishable from her money, and to her lack of business knowledge. The record shows, however, that she understood what she was doing. The agent for the insurance company that had issued the two policies payable to her daughter, which the respondent had concealed, testified that she offered him the sum of $2000 if he would see that the checks in payment of the policies were made payable to her individually rather than as guardian of her child's estate. She admitted this. In addition, in arranging for the transfer of other funds into an account from which she was able to withdraw without court approval, she executed false affidavits stating that certain bank books had been lost, when she knew they were in the possession of her attorney. This, too, she admitted. And to bring about the transfer of these deposits she hired a lawyer other than the attorney who represented her as guardian. In the light of these circumstances, we can not say that the trial court abused its discretion in imposing sentence.

The judgment of the probate court of Cook County is affirmed.

Judgment affirmed.

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

BRIEF FOR RESPONDENT IN OPPOSITION.

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THE BLAKELY PRINTING COMPANY, CHICAGO 56

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OPINION BELOW.

The opinion of the Supreme Court of Illinois is reported as *The People of the State of Illinois* v. *Gloria Stollar*, 31 Ill. 2d 154, 201 N. E. 2d 97, decided on May 20, 1964, and reprinted at Appendix 1 of the Petition.

JURISDICTION.

Since the proper raising of a substantial federal question in the state court proceeding is mandatory in order to invoke the Jurisdiction of the Supreme Court of the United States under 26 U. S. C. § 1257, it is the position

of the respondent that the petition, being substantially defective in this regard, must be denied, *Zucht* v. *King,* 260 U. S. 174; *Palmer Oil Corporation* v. *Amerada Corp.,* 343 U. S. 390.

QUESTION PRESENTED.

Whether the decision of the Supreme Court of Illinois, which affirmed an eighteen month contempt of court sentence imposed upon petitioner, is subject to review by this Court when the federal question which is sought to be raised had not been presented prior to the institution of this proceeding.

STATEMENT.

Initially, the relator deems it necessary to comment upon the liberties taken by petitioner in setting forth the nature and facts of the case (Petition, pp. 3, 5-6).

First, petitioner claims that "the questions presented in this petition were raised primarily as a result of the Supreme Court of Illinois' opinion affirming the order of the Probate Court of Cook County" (Petition, p. 5). Such is not the case. Nothing in the opinion of the Supreme Court of Illinois (Petition, App. 1-5), or in the original brief or petition for rehearing filed by petitioner in the Supreme Court of Illinois raises the question of whether petitioner was denied due process of law as a result of her sentence for contempt of court. The only question raised by petitioner and duly answered by the Illinois Supreme Court was whether Ch. 38, § 1-7, Ill. Rev. Stat. 1963, limited the permissible sentence that may be imposed for contempt of court. The Supreme Court of Illinois, in deciding such statutory issue contrary to the petitioner, neither sought to nor actually raised the constitutional issue here claimed by petitioner. For the petitioner to now attempt to create a federal constitutional issue in this court involving the question of sentencing, when no such issue was presented by her at any stage of the state court proceedings, is violative of the rule that the state court be apprised, with fair precision, of the federal claim and the grounds thereof.

Secondly, the implication arising from the statement that petitioner was arrested by being taken from her hospital bed immediately after giving birth to an illegitimate child (Petition, p. 3) is incorrect. The opinion of the

Supreme Court of Illinois (Petition, App. 2), as evidenced by the proceeding in the trial court (Abstract of Record, p. 44), is exceedingly clear on the point that a twelve day period had passed between the return day of the rule to show cause and the issuance of the body attachment, and the commencement of the hearing, which was postponed from November 2, 1962 to November 13, 1962, when it was determined that petitioner was under a doctor's care. Such documented facts are hardly comparable to the impression conveyed by the petitioner regarding the placing of her in custody.

Thirdly, the statements made by petitioner regarding her emotionally disturbed state, the need for psychiatric care, and the failure of the court to order a sanity hearing (Petition, p. 3) seem quite specious, for while such arguments were made before the Supreme Court of Illinois and were decided adversely to petitioner, they are not included as a basis of the theory set forth in the present petition.

Fourthly, the "summary" contempt proceedings to which petitioner was subjected was in fact conducted intermittently between November 13, 1964 and November 23, 1964 and is contained in a record totalling some 700 pages. The hearings produced testimony of other witnesses beside petitioner as well as closing arguments and various post trial motions. In this sense, petitioner's expression that the contempt action to which she was exposed was direct and prompt, or without delay or formality is a misconception of the existing facts of the case at bar.

On May 5, 1959, one Harry Stollar died (Abst. 80) leaving the major portion of his estate for the benefit of his minor daughter, Jacqueline. On July 8, 1959, Gloria Stollar, the wife of the deceased, was appointed guardian of the estate of the minor child and bonded in the amount of $71,000 (Abst. 8; Record 16). On August 10, 1959,

Gloria Stollar, hereinafter designated petitioner, was appointed executrix of her husband's estate and on November 2, 1959, filed an inventory of the estate, under oath, stating the full amount of the estate to be $47,784.90 (Abst. 1; Record 659). On November 9, 1959, an order was entered in the Probate Court of Cook County approving the inventory filed by the petitioner as true and correct and granting the guardian the sum of $200 per month for the support of the minor child, which amount was subsequently raised to $300 per month (Abst. 8, 9; Record 659). Between the commencement of proceedings in the Probate Court and October 24, 1960, the funds designated by the petitioner to be the entire proceeds of the estate were deposited in the Exchange National Bank of Chicago, and on the aforementioned date totalled $43,764.53 (Abst. 1). On October 24, 1960, a petition was filed by Arthur Bluestein, attorney for the guardian of the minor, who had represented the deceased in prior business transactions, on behalf of the petitioner, requesting that the remaining funds should be transferred from the Exchange National Bank to various other depositories for the sake of convenience (Abst. 10, 11). An order was then signed by the Probate Court of Cook County allowing the transfer of $7500.00 cash to 1) Bell Savings and Loan Association; 2) Chicago Federal Savings and Loan Association; 3) First Federal Savings and Loan Association; and 4) Belmont National Bank of Chicago which accounts were subject to order of Court (Abst. 10, 11; Record 703). A further transfer of $13,764.53 was made to the Aetna State Bank, at 2375 North Lincoln Avenue, Chicago, Illinois (Abst. 11; Record 703).

Unbeknown to the Court, the petitioner received shortly after her husband's death, the cash proceeds of certain insurance policies paid by the Prudential Life Insurance Company on the life of Harry Stollar totalling $24,296.05 (Abst.

9; Record 712, 724). The checks were payable to "Gloria Stollar as Guardian of Jacqueline Stollar." (Abst. 9; Record 724, 712). After petitioner unsuccessfully attempted to induce the insurance agent, one Sol Palles, with the sum of $2000.00 to change the name of the beneficiary of the checks solely to herself (Abst. 57, 76, 77) she deposited the checks, as originally made out, with the Aetna State Bank on July 30, 1959 (Abst. 123).

The account in which these funds were deposited was entitled "Gloria Stollar, as guardian of Jacqueline Stollar" (Abst. 9). The account was closed on June 8, 1960, by the petitioner with a final withdrawal of $5100 (Abst. 62). At no time prior to the institution of the contempt proceedings did the petitioner disclose the receipt by her of the proceeds of the two Prudential policies or of their existence to the Court, or report to the Probate Court the total amount or any part of the remuneration from the policies as part of the inventory, or request permission of the Court to withdraw or expend funds from these policies (Abst. 49, 73, 74).

On June 15, 1961, the petitioner, without disclosing her actions to her attorney, Arthur Bluestein, solicited the aid of attorney Morton Kovin to petition the Probate Court for the transfer of all remaining funds of the estate to the Aetna State Bank (Abst. 115-116). The petitioner, once in possession of the court order allowing such transfer of funds, carried out such transfer although she did not have in her possession three of the four bank books of the depositories in which the funds were then stored (Abst. 67). The bank books were then in the hands of Attorney Bluestein, who had made various attempts without success to meet with petitioner and discuss the financial situation of the estate (Abst. 92-93). The transfer was effected by petitioner signing lost bank book affidavits at those institutions at which she did not possess the bank book, al-

though having full knowledge of their location (Abst. 67; Record 670). Petitioner retained Attorney Kovin stating to him that she had discharged her previous attorney and that, under the circumstances, communication between the two was unnecessary (Abst. 121).

In August of 1961, approximately one year before the institution of the present contempt case, a rule to show cause was issued against petitioner for failure to file a final account and make distribution of assets as executrix of the estate of Harry Stollar, deceased, in accordance with the final account (Record 99-103). A writ of attachment for contempt was issued on September 7, 1961, for failure to respond to the rule to show cause on the date designated (Record 104). A hearing on the question of removal of plaintiff in error was then set, with petitioner free on her own $1000 recognizance bond (Record 105). On November 24, 1961, petitioner was ordered to pay $1960.60, which sum represented fees, costs, and claims against the estate, payable at the rate of $100 per month (Record 111-112). Petitioner made the $100.00 payment on December 5, 1961, which check was returned as lacking sufficient funds (Record 113). On January 19, 1962, the court ordered petitioner to pay $1800.00 toward the aforementioned obligation (Record 116) which payment, when made by petitioner, was a check drawn on a nonexistent account (Record 123). A contempt *mittimus* was then issued for petitioner's arrest on January 25, 1962, for the violation of court orders (Record 123). Petitioner was released from custody with the payment to the Probate Court Clerk of the amount due by her father, Eugene Roseth.

On September 24, 1962, Attorney Arthur Bluestein, after obtaining knowledge of the financial condition of the estate of Jacqueline Stollar, minor, through correspondence with the President of the Aetna State Bank and after unsuccessfully attempting to learn the manner and extent of the

petitioner's expenditures not sanctioned by the Court, filed a petition before the Probate Court of Cook County in which he informed said court of certain acts of misconduct perpetrated by the petitioner (Abst. 1). The Court, on September 26, 1962, appointed Edward Arkema guardian *ad litem* to investigate all matters in connection with Bluestein's petition (Abst. 7). On October 17, 1962, the report of the guardian *ad litem* disclosed certain misconduct on the part of petitioner's handling of the funds of the estate; to wit, the filing of a false inventory and current account in which there was a gross failure to disclose cash benefits accruing to the estate from two insurance policies, and unauthorized withdrawals of funds during the course of several years (Abst. 7-14). A rule to show cause was issued on the same date, returnable November 2, 1962 (Abst. 16). Upon petitioner's failure to appear, a writ of attachment was issued (Abst. 18) said writ not fully capable of execution, since petitioner had given birth to a child and was under doctor's care (Abst. 44).

Upon the release of petitioner from medical care, she was brought before the Probate Court. represented by counsel, and given a full and complete hearing on the contempt charges. At the hearing, at which other witnesses also testified, petitioner fully related the events of the preceding years, admitting her failure to file a *proper* inventory, and current account, admitting her use of the insurance proceeds without disclosure, and admitting the course of her conduct by which she was, without authorization able to withdraw funds (Abst. 48-74, 137-151). The hearing, which commenced on November 13, 1962, terminated on November 23, 1962, with the imposition of sentence upon petitioner for her separate acts of contempt of court (Abst. 153).

Upon a full accounting presented to the court, it was established that the petitioner, without authorization, ex-

pended $59,410.58 (Record 603). In addition to the contempt conviction, petitioner was removed as guardian of the estate of the minor, and a guardian of the person of the minor was appointed.

During the contempt hearing, testimony indicated that all that remained of the $73,000, once the total sum of the estate, was the sum of $81.09 (Abst. 124).

On December 12, 1962, post trial motions filed by petitioner—Motion to Arrest Judgment, Motion to Reconsider, and Motion for a New Trial—were denied, the court allowing a Motion to Stay Mittimus (Abst. 153). Subsequent to these motions, a writ of error was taken to the Supreme Court of Illinois.

On January 17, 1964, that Court denied the motion of the guardian *ad litem* to transfer this cause to the Appellate Court for failure to demonstrate direct appellate jurisdiction.

The Supreme Court of Illinois affirmed the decision of the Probate Court of Cook County on May 20, 1964, rehearing denied September 25, 1964.

ARGUMENT.

The Supreme Court of Illinois, in affirming the findings of the Probate Court of Cook County, decided the three specific issues raised by petitioner's brief. The issues were: 1) failure to conduct a sanity hearing, and 2) failure to grant a continuance, both of which, it was asserted, violated petitioner's federal constitutional rights by denying due process of law. Neither of these issues are cited in petitioner's brief as a basis for the granting of the petition, and, therefore, must be deemed to have been waived for purposes of attaining a writ of *certiorari*. The third issue, that of the excessiveness of the eighteen month contempt sentence, was clearly raised as a statutory issue and was neither expressly nor impliedly characterized as a federal constitutional issue for determination by the Supreme Court of Illinois. The decision of the latter body was strictly limited to the interrelationship of Ch. 38, § 1-7 and Ch. 38, § 1-3, Ill. Rev. Stat. 1963. Further, the petition for rehearing filed by petitioner in the Supreme Court of Illinois categorically failed to raise the constitutional question which has been advanced before this tribunal.

With the above factual pattern before this Court, the issue before it for determination is, rather than the question of whether petitioner was denied due process of law in being the recipient of an eighteen month sentence for contempt of court, whether such decision is subject to review when the federal question which is sought to be raised has not been presented, but could have been, prior to the institution of this proceeding.

It is the contention of the respondent that the substantive federal question which petitioner has raised in this Court

has, in fact, been raised for the first time; that under no circumstances can it be stated that such question had been properly raised in any of the prior proceedings; and that the theory that the decision of the Supreme Court of Illinois prompted the federal constitutional issue is unfounded, since both that decision, as well as the petition for rehearing, offer no minimal criteria on which to base valid jurisdictional grounds.

It is a generally accepted rule of this Court that a substantial federal question must have been raised and brought to the State court's attention with fair precision, *Zucht* v. *King*, 260 U. S. 174. *Palmer Oil Co.* v. *Amerada Corp.*, 343 U. S. 390. The statement best characterizing this mode of procedure is found in *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648 at 655, where the Court stated:

> ". . . the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a federal right."

Moreover, it must not only be made to appear that some particular provision of the Federal Constitution, as opposed to the State Constitution, was raised, *New York Central & H. R. Co.* v. *New York*, 186 U. S. 269, but specification of the stage in the proceedings where the federal question sought to be reviewed was considered is of paramount importance (Rule 23 (1) (f), Rules of Supreme Court of United States). Needless to say, all such procedure has been violated in this case.

Petitioner, however, in attempting to formulate the issue raised within the proper framework of 26 U. S. C. 1257 (3), impliedly asserts that the decision of the Supreme Court of Illinois on the issue of statutory construction was the first instance that petitioner could have possibly raised the

constitutional issue, and that the petition for rehearing so accomplished this objective, thus preserving the substantive issue for determination here. Such reasoning would have one believe that the state statute was given such a new and unanticipated construction which threatens rights under the federal constitution. *Brinkerhoff-Faris Co.* v. *Hill,* 281 U. S. 673.

The respondent contends that the facts portend a contrary interpretation, for A) the conviction and sentence of petitioner in the Probate Court of Cook County placed into effect the vehicle whereby petitioner could have raised the constitutional claim immediately, but failed to do so, and B) the prior proceedings clearly show that the constant intention of petitioner was limited to the issue of statutory *construction* and not statutory *validity.*

The decision by the Supreme Court of Illinois has not, by its decision, created a situation where the litigant had no prior opportunity to assert the particular federal question. Such opportunity was presented to her from the time that a motion for a new trial was due and filed through to the briefing stages on appeal. The opportunity was not seized. Instead, petitioner seeks now to by-pass all regular channels of procedure in the hope of "striking a resonant chord" so that the errant procedure heretofore followed will be relegated to a secondary position, with the substance of her claim the primary objective. It is evident that the sentencing of petitioner to a term in excess of one year, coupled with the unequivocal language of Ch. 38, § 1-3, exempting contempt from the limitation of one year as regards punishment, clearly set the stage for the initiation of the federal question. For petitioner to now state that such was not apparent when the sentence was entered by the Probate Judge is not reasonable.

But even if it be assumed that the decision of the highest

state court is as petitioner contends, her failure to specifically raise the federal constitutional question in the petition for rehearing is fatal.

In summary, it is the position of Respondent that the emergence of the federal question resulted, initially, in the petition for Writ of Certiorari and, as such, constitutes tardiness which bars the granting of the Writ. Further, even if the first opportunity to raise such federal question resulted from the decision of the highest state court, petitioner's absolute failure to specifically raise the federal constitutional grounds in her petition for rehearing bars further review.

CONCLUSION.

For the aforementioned reasons, relator respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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No. 783

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

GLORIA STOLLAR,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

PETITIONER'S REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

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PETITIONER'S REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

The respondent does not contest whether the case presents a question of sufficient importance to warrant this Court's exercise of its discretionary jurisdiction. One may almost say, without being presumptuous, that that matter was concluded by the grant of certiorari in *Harris* v. *United States*, No. 526, October Term, 1964, on December 14, 1964, ten days before the petition in this case was filed.

The thrust of respondent's brief in opposition is that the Federal Question was not raised in the court below,

and, therefore, this Court cannot decide a question which was not raised below. As a general statement of law the respondent's position is correct. There have almost always been, however, significant exceptions to that rule. *Saunders* v. *Shaw,* 244 U.S. 317. The most common exception has been where the decision of the highest state court has supplied a new and unexpected basis for a claim by the defeated party of the denial of a federal right. *Great Northern Ry. Co.* v. *Sunburst Oil & Refining Co.,* 287 U.S. 358, 53 S. Ct. 145, 77 L. Ed. 360. We believe that to have been the case here. By its refusal to apply the statutory limit of punishment for misdemeanors to contempt cases, the Illinois Supreme Court created the question of whether there must constitutionally be a limit to summary contempt punishment.

More "surprising" than the decision of the Supreme Court of Illinois, perhaps, was the opinion of this Court in *United States* v. *Barnett,* 376 U.S. 681, 84 S. Ct. 984, 12 L. Ed. 2d 23, for, in that case was first articulated the question which we present to the Court. The decision of this Court in *Barnett* was announced on April 6, 1964, a point in time after the present case was briefed and argued in the Supreme Court of Illinois. After its opinion was rendered, the Supreme Court of Illinois refused to reconsider.

Perhaps, as some theoreticians suggest, the question presented in this case was always *in posse* if not actually *in esse* and, therefore, petitioner should have raised it in the trial court at the latest. We submit, however, that this Court or some members of the Court were of the opinion that it was then necessary to enunciate the question of the constitutional length of summary contempt punishment to place bench and bar on notice of it. We further submit that if the question did not at that time emerge Athena-

like full blown, at least it then first emerged in a fully articulated state as a question to be considered by this Court.

The petitioner here should not be penalized because she could not foretell the emergence of a question which members of this Court caused to be specifically stated in a dictum in the *Barnett* opinion because they apparently believed that it would not have emerged without such statement.

In any event we believe that a well settled rule of appellate jurisdiction to decide a question is applicable here. That rule is that the question of jurisdiction of the court below to enter the judgment in question or the jurisdictional validity of the judgment may be raised at any time in the proceedings and may be raised for the first time on appeal. Cf. *Glidden* v. *Zdanok*, 370 U.S. 530, 82 S. Ct. 1459, 8 L.Ed. 2d 671, *American Construction Co.* v. *Jacksonville, T. & K. W. R. Co.*, 148 U.S. 372, 13 S. Ct. 758, 37 L. Ed. 486. The sentence in this case is attacked as being constitutionally void and if so the trial court below was constitutionally without jurisdiction to enter such a judgment. On such basis this Court has jurisdiction to determine a question of jurisdiction raised for the first time in the petition for a writ of certiorari.

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